

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No. 04-34814 - GFK

Michael Allen Norby
Elma Lanes, Inc.
Kirstin May Norby
Elma Lanes, Inc.,

Debtors.

**NOTICE OF HEARING AND
MOTION OBJECTING TO CLAIMED EXEMPTIONS**

To: The above-named Debtors, their attorney, Paul W. Bucher, and other parties in interest specified in Local Rule 9013-3.

1. Security State Bank, a Creditor in the above-captioned matter, moves the Court for relief requested below and gives notice of hearing herewith.

2. The Court will hold a hearing on this Motion on November 16, 2004, at 11:00 A.M., or as soon thereafter as counsel can be heard, before the Honorable Gregory F. Kishel, Courtroom 228B, at the United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this Motion must be filed and delivered not later than 11:00 A.M. on November 11, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail not later than November 5, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). If no response is timely filed, the Court may, in its discretion, enter an Order without a hearing.

UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this Motion or this Motion is authorized under 28 U.S.C. §§ 157 and 1334, Fed. R. Bankr. P. 5005, and Local Rule 1070-1. This proceeding is a core proceeding. This Chapter 7 case was commenced on August 17, 2004. Charles W. Ries was appointed as Chapter 7 Trustee on August 18, 2004. The first meeting of creditors was scheduled for September 17, 2004, at 1:30 P.M. This case is now pending in this Court.

5. This Motion arises under 11 U.S.C. § 522, Fed. R. Bankr. P. 4003, and Local Rule 4003-1(a). This Motion is filed under Fed. R. Bankr. P. 9014 and Local Rules 9013-1 and 9013-2.

6. Debtors have scheduled certain assets as exempt on Schedule C, including as follows:

14 ton bulk bin (fixture)	MSA § 550.37, subd. 5	\$50.00
2 - 7,000 bushel grain bins (fixture)	MSA § 550.37, subd. 5	\$50.00
20 x 42 silo (fixture)	MSA § 550.37, subd. 5	\$50.00
3 - 3 ton bulk bins attached to hog buildings (fixture)	MSA § 550.37, subd. 5	\$50.00
Checking account First State Bank 102 West Main LeRoy, MN 55951	MSA § 550.37, subd. 13	\$106.00
Hog contract payment owing	MSA § 550.37, subd. 13	\$750.00
Norby Farm checking account First State Bank 102 West Main LeRoy, MN 55951	MSA § 550.37, subd. 13	\$20.00
Payment for machine hire from Gary Norby	MSA § 550.37, subd. 13	\$713.00
Whole Life Insurance Policy of Daughter, Ashley Norby Life Investors Insurance Company of America 4333 Edgewood Road NE Cedar Rapids, IA 52499	MSA § 550.37, subd. 23	\$440.00
Whole Life Insurance Policy of Son, Nick Norby Northwestern Mutual 1400 Corporate Center Circle Eagan, MN 55121	MSA § 550.37, subd. 23	\$3,546.00

7. Movant objects to the above-noted exemptions claimed in that schedule for the following reasons:

- (a) The Debtors have claimed fixtures exempt pursuant to MSA § 550.37, subd. 5, as farm machines and implements. Objection is made because the above-noted items of property are neither farm machines nor implements

and are undervalued on the Debtors' Schedules based upon a Sworn Statement of the Debtor made three months pre-Petition.

- (b) The Debtors have claimed life insurance policies as exempt pursuant to MSA § 550.37, subd. 23. Objection is made because certain life insurance policies naming Debtors' children as insureds are non-exempt assets pursuant to MSA § 550.37, subd. 23.
- (c) The Debtors have claimed a hog contract payment owing as exempt pursuant to MSA § 550.37, subd. 13, and have claimed a payment for machine hire from Gary Norby as exempt pursuant to MSA § 550.37, subd. 13. The Creditor believes that neither a hog grower contract nor a machine hire contract qualify as earnings pursuant to Minn. Stat. Chapter 571.
- (d) The Debtors have claimed a checking account and farm checking account as exempt pursuant to MSA § 550.37, subd. 13. Objection is made because Movant does not have sufficient information to determine if the account balances are wages pursuant to MSA § 550.37, subd. 13. The burden is on the Debtors to show that account balances are from wages.

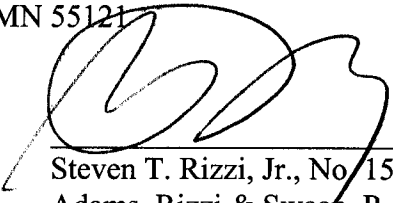
WHEREFORE, the Movant requests that the Court deny the following exemptions claimed by the Debtors:

Denying the claimed exemption of :

1. 14 ton bulk bin (fixture)
2. 2 - 7,000 bushel grain bins (fixture)
3. 20 x 42 silo (fixture)
4. 3 - 3 ton bulk bins attached to hog buildings (fixture)
5. Checking account, First State Bank, 102 West Main, LeRoy, MN 55951
6. Hog contract payment owing
7. Norby Farm checking account, First State Bank, 102 West Main, LeRoy, MN 55951
8. Payment for machine hire from Gary Norby

9. Whole Life Insurance Policy of Daughter, Ashley Norby, Life Investors Insurance Company of America, 4333 Edgewood Road NE, Cedar Rapids, IA 52499
10. Whole Life Insurance Policy of Son, Nick Norby, Northwestern Mutual, 1400 Corporate Center Circle, Eagan, MN 55121

Dated October 14, 2004


Steven T. Rizzi, Jr., No. 153126
Adams, Rizzi & Sween, P.A.
Attorneys for Creditor, Security State Bank
300 First Street NW
Austin, Minnesota 55912
Telephone (507) 433-7394

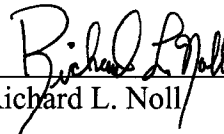
VERIFICATION

STATE OF MINNESOTA

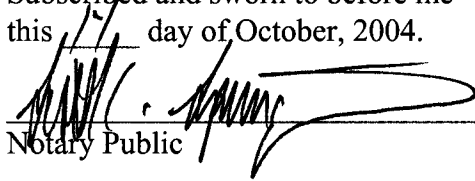
ss.

COUNTY OF MOWER

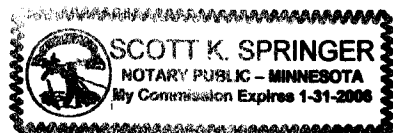
Richard L. Noll declares under penalty of perjury that he is the Executive Vice President/Senior Lending Officer of Security of Security State Bank; that he has read the foregoing Notice of Hearing and Motion Objecting to Claimed Exemptions and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes them to be true.


Richard L. Noll

Subscribed and sworn to before me
this 14 day of October, 2004.


Notary Public

(SEAL)



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No. 04-34814 - GFK

Michael Allen Norby
Elma Lanes, Inc.
Kirstin May Norby
Elma Lanes, Inc.,

Debtors.

MEMORANDUM OF LAW

FACTS

The Debtors have scheduled certain items of personalty as exempt as set forth in the Motion appurtenant hereto. Creditor, Security State Bank, objects to the exemptions as set forth, and makes this Memorandum of Law in support thereof.

ANALYSIS

Farm Machines and Implements

The Debtors have claimed that certain items are farm machines and implements and are therefore exempt pursuant to Minn. Stat. § 550.37, subd. 5. However, the property claimed as exempt has been held by this Court not to be a farm machine or implement. This Court has previously held that grain bins are not farm machines or implements. *In Re Peters*, 60 BR 711, 715-716 (Bankr. D. Minn. 1986).

Even if any of these items are to be considered farm machines or implements, the Debtors have seriously undervalued each and every item objected to such that the Debtors' claimed exemptions will exceed the statutory limit of \$13,000.00. For proper valuation, please see the Affidavit of Richard L. Noll at Exhibit A.

Hog Contract and Machine Hire Payments

The Debtors have exempted payments for machine hire and payments for a hog contract pursuant to Minn. Stat. § 550.37, subd. 13, as earnings. However, exempt earnings are "all earnings not subject to garnishment by the provisions of § 571.922." Minn. Stat. § 550.37, subd. 13 (2003). For purposes of Minn. Stat. § 571.922, earnings are defined in the forms at Minn. Stat. § 571.75 as "compensation paid or payable to *an employee* for personal services or compensation paid or payable to the producer for the sale of agricultural products; milk or milk products; or fruit or other horticultural products produced when the producer is operating the family farm. . . ." Minn. Stat. § 571.75, subd. 2 (2003) (at two locations in subd.). (emphasis added). A hog contract does not constitute an employee-employer relationship, but instead constitutes an independent contractor relationship and/or a building lease agreement. Furthermore, under hog contracts, the independent grower is not the producer or owner of the product and is not paid for the sale of the product but is instead paid for a pig space lease and/or the performance of contracted services. Furthermore, a machine hire is custom work also performed on an independent contractor basis or on a rental basis and does not qualify as an employee-employer relationship.

The test for determining whether a party is an independent contractor or an employee is as follows:

1. Who has the right to control the means and manner of performance;
2. The mode of payment;
3. The furnishing of material or tools;
4. The control of the premises where the work is done; and

5. The right of the employer to discharge.

Ossenfort v. Associated Milk Producers, Incorporated, 254 N.W.2d 672, 676 (Minn. 1977) (citing *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964)). Of these factors, the most important factor "in light of the nature of the work involved is the right of the employer to control the means and manner of performance." *Id.* In describing the nature of the control, "the determinative right of control is not merely over what is to be done, but primarily over how it is to be done." *Id.* (citing *Frankle v. Twedt*, 234 Minn. 42, 47, 47 N.W.2d 482, 487 (1951)).

In this Creditor's experience, hog contracts are generally listed as an independent contractor agreement, wherein debtor is paid to feed and house hogs with the producer/owner of the hogs, having no right to control the debtor's day-to-day activities. In these contracts, the debtor is allowed to hire and fire his or her own employees and the producer has no right to exercise control pursuant to the independent contractor grower agreement. While mode of payment depends upon information from the producer, it should be apparent from the debtor's tax returns whether the debtor receives a 1099 rather than a W-2 indicating that it is, in fact, an independent contractor agreement. Pursuant to general independent contractor grower agreements, the furnishing of materials and tools is strictly the responsibility of the debtor with an opportunity to borrow or rent tools (equipment) from the producer if necessary. The provision of the pig spaces is entirely the responsibility of the debtor, again indicating the independent contractor relationship. Pursuant to the contract, the producer does not have a right to discharge the debtor. Instead, the producer has reserved a right to terminate the contract given a material breach as defined by the contract.

The relationship between the debtor and the producer is defined in the independent contractor grower agreement. This Creditor has requested a copy of the grower agreement from the Trustee. The Trustee has not, to date, received this information from the Debtors. Unless this information is received prior to the hearing, the Movant will request that this Motion as it relates to this property, be commuted to a Motion to extend the time limits to object to these exemptions.

Similarly, based upon general machine hire agreements, the payment for machine hire is also not an employee-employer relationship. The debtor is hired to complete a job as is common with custom farm work. The producer maintains no control over the hiree as the hiree completes the job. Again, information regarding this relationship has been requested from the Trustee, and, if this information is not received prior to the hearing on this Motion, Movant will request that this Motion be commuted to a Motion to extend the time limits to object to exemptions as they relate to this property.

Since contract payments are not earnings under Minn. Stat. § 571.922, they cannot be exempted as earnings under Minn. Stat. § 550.37, subd. 13.

Life Insurance Policies

The Debtors seek to exempt five different life insurance policies under Minn. Stat. § 550.37, subd. 23. That provision, however, only applies where "the insured is the debtor or an individual of whom the debtor is a dependent." Minn. Stat. § 550.37, subd. 23 (2003). The insured must be the debtor or the debtor's parents or guardian. There is no provision for exempting a life insurance policy with the Debtors' children as insureds as the Debtors have sought to exempt.

Checking Accounts

The Debtors have scheduled two separate checking accounts as exempt pursuant to Minn. Stat. § 550.37, subd. 13, as earnings. Pursuant to that subdivision, disposable earnings are exempt "for 20 days after deposit in any financial institution." Minn. Stat. § 550.37, subd. 13 (2003). Furthermore, these exempt funds must be traced to "earnings" as that term is used in Minn. Stat. § 571.922 (defined in Minn. Stat. § 571.75). Pursuant to the exemption statute, "the burden of establishing that funds are exempt rests upon the debtor." Given the Debtors' liberal use of the term "earnings" as used herein, unless the Debtors are able to prove that these are, in fact, earnings and have been in these accounts for less than 20 days on the date of filing, these exemptions should also be denied.

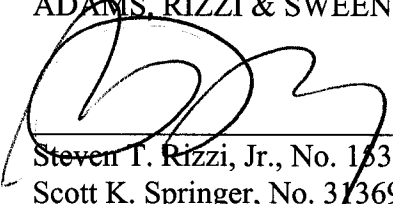
CONCLUSION

For all of the foregoing reasons, the Creditor respectfully requests that the relief requested in Creditor's Motion be granted.

Respectfully submitted,

ADAMS, RIZZI & SWEEN, P.A.

Dated: October 14, 2004



Steven T. Rizzi, Jr., No. 153126
Scott K. Springer, No. 313695
Attorneys for Creditor, Security State Bank
300 First Street NW
Austin, Minnesota 55912
Telephone (507) 433-7394

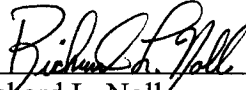
VERIFICATION

STATE OF MINNESOTA

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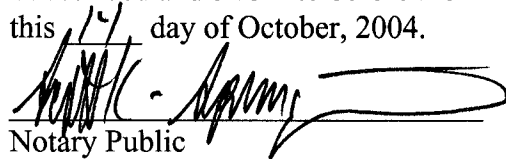
COUNTY OF MOWER

Richard L. Noll declares under penalty of perjury that he is the Executive Vice President/Senior Lending Officer of Security of Security State Bank; that he has read the foregoing Memorandum of Law and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes them to be true.



Richard L. Noll

Subscribed and sworn to before me
this 14 day of October, 2004.



Notary Public

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No. 04-34814 - GFK

Michael Allen Norby
Elma Lanes, Inc.
Kirstin May Norby
Elma Lanes, Inc.,

Debtors.

AFFIDAVIT OF RICHARD L. NOLL

STATE OF MINNESOTA

ss.

COUNTY OF MOWER

Richard L. Noll, being first duly sworn on oath, deposes and states as follows:

1. I am the Executive Vice President/Senior Lending Officer of Security State Bank who is a Creditor in the bankruptcy filing of Michael Allen Norby and Kirstin May Norby, Bankruptcy Case No. 04-34814 - GFK. I make this Affidavit in support of the Creditor, Security State Bank's, Motion Objecting to Claimed Exemptions.

2. Attached as Exhibit A is a true and correct copy of a signed Financial Statement given by Debtor, Michael Norby, to Security State Bank in March of 2004.

3. This Financial Statement was not listed under paragraph 19 of the Debtors' Statement of Financial Affairs.

4. The Financial Statement attached as Exhibit A shows a substantially higher value for the Debtors' property, specifically the 14 ton bulk bin, the 2 - 7,000 bushel grain bins, the 20 x 42 silo, and the 3 - 3 ton bulk bins.

5. Based upon my experience in the banking industry, I believe that the items have a higher value than that listed in the Debtors' Schedules.

6. Further, affiant saith not.

Dated this 14th day of October, 2004.

Richard L. Noll
Richard L. Noll

Subscribed and sworn to before me
this 14th day of October, 2004.

[Signature]
Notary Public

(SEAL)



EXHIBIT A

Schedule G: Crops and Feed

Crop	Description	Quantity	Value Per Unit	Value
Cash Corn	10% over CCC loan	900 bu.	2.70	2,430
Total crops held for sale or feed				2,430

Schedule J: Machinery and Equipment

Make/Model	Model Year	Serial No./VIN	Year Purchased	Pct. Ownership	Market Value
20 x42 silo	-		-	100.00 %	3,000
(2) 7,000 bushel Grn bins	-		-	100.00 %	3,000
14 ton bulk bin	-		-	100.00 %	1,000
(3) 3 ton bulk bin	-		-	100.00 %	1,500
6 x 22 hog trailer	-		-	100.00 %	2,000
Hog equipment	-		-	100.00 %	3,000
Pressure washer	-		-	100.00 %	500
Woods lawn mower	-		-	100.00 %	3,000
Total machinery and equipment					17,000

Schedule M: Farm Land

	Acres	Mkt Value Per Acr	Market Value
Building site	10	21,500	215,000
Appraised 9/20/2003)	-	-	-
Total land			215,000

Schedule P: Nonfarm Assets

	Quantity	Mkt Value Per Unit	Market Value
Savings and checking			-
Stocks and bonds			-
Other current assets			-
Furnishings and appliances			25,000
Vehicles (Schedule X)			21,800
Cash value of life insurance			-
Retirement accounts			-
Other intermediate assets			-
Nonfarm real estate			-
Other long term assets			-
Total nonfarm assets			46,800

Schedule R: Crops Under Government Loan

Crop	Description	Quantity	Loan Rate	Interest Rate	Mo/Year Entered	Value Per Unit	Total Value	Loan Principal	Accrued Interest	Net Value	Treat As
Cash Corn		12,600 bu.	1.89	2.375 %	12/2003	2.50	31,500	23,814	153	7,533	Loan
Total crops under government loan							31,500	23,814	153	7,533	

Schedule S: Current Farm Loans

	Interest Rate	Principal Balance	Accrued Interest	Normal P & I	Past Due P & I	Month Due	Balance
Opr. loan -	- %	-	-	-	-	-	-
Sec St Bank	8.00 %	15,751	93	-	-	4	15,751
Sec St Bank	8.00 %	15,000	88	-	-	4	15,000
FSB Crop	6.00 %	8,500	-	-	-	0	8,500
Total current loans		39,251	181	-	-		39,251

Schedule T: Intermediate Farm Liabilities

	Interest Rate	Principal Balance	Accrued Interest	Normal P & I	Past Due P & I	Month Due	Final Year	Principal Due	Intermed Balance
SSB M/E Line	8.00 %	30,000	177	-	-	4	2004	-	30,000
SSB Install	7.50 %	2,857	7	2,400	-	multiple	2004	2,254	603
NHCC Mower	- %	3,352	-	2,172	-	multiple	2005	2,172	1,180
Total intermediate farm liabilities		36,209	184	4,572	-			4,426	31,783

Schedule U: Long Term Farm Liabilities

	Interest Rate	Principal Balance	Accrued Interest	Normal P & I	Past Due P & I	Month Due	Final Year	Principal Due	Lg Term Balance
Wash Mutual	6.75 %	102,397	-	13,860	-	multiple	2014	7,165	95,232
CFMC/AHES	9.00 %	39,000	-	5,076	-	multiple	2021	1,631	37,369
Total long term farm liabilities		141,397	-	18,936	-			8,796	132,601

Schedule V: Nonfarm Liabilities

Nonfarm accrued interest -

Nonfarm accounts payable and accrued expenses -

Principal due within 12 months on term loans 3,836

	Interest Rate	Principal Balance	Accrued Interest	Normal P & I	Past Due P & I	Month Due	Final Year	Principal Due	Balance
Current Loans									
Intermediate									
GMAC	9.00 %	20,159	-	5,496	-	multiple	2008	3,836	16,323
Long Term									
Total nonfarm liabilities		20,159	-	5,496	-			3,836	20,159

Schedule X: Nonfarm Vehicles

Make/Model	Model Year	Serial No./VIN	Year Purchased	Pct. Ownership	Market Value
1998 Chev Lumina	-		-	100.00 %	2,000
1992 Suburu Legacy	-		-	100.00 %	800
1984 Chev 4 x 4 pickup	-		-	100.00 %	1,000
1999 Suburban	-		-	100.00 %	18,000
Total nonfarm vehicles					21,800

Schedule Y: Ratio Analysis

	Market
Current ratio	0.44
Farm working capital	-42,675
Current farm percent in debt	225 %
Intermediate farm percent in debt	187 %
Current + intermediate farm percent in debt	212 %
Long term farm percent in debt	62 %
Nonfarm percent in debt	43 %
Total debt to asset ratio	84 %
Total equity to asset ratio	16 %
Total debt to equity ratio	507 %

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No. 04-34814 - GFK

Michael Allen Norby
Elma Lanes, Inc.
Kirstin May Norby
Elma Lanes, Inc.,

Debtors.

ORDER

At St. Paul, Minnesota, this _____ day of _____, 2004.

The above-captioned matter came before the Court on objection of Creditor, Security State Bank, to exemptions. Appearances were as noted upon the record.

Based upon the files, records, and proceedings herein,

IT IS HEREBY ORDERED,

That Movant, Security State Bank's, objection is sustained and

1. The claimed exemption of 14 ton bulk bin (fixture) is denied.
2. The claimed exemption of 2 - 7,000 bushel grain bins (fixture) is denied.
3. The claimed exemption of 20 x 42 silo (fixture) is denied.
4. The claimed exemption of 3 - 3 ton bulk bins attached to hog buildings (fixture) is denied.
5. The claimed exemption of checking account, First State Bank, is denied.
6. The claimed exemption of growing crops (corn and beans) is denied.
7. The claimed exemption of hog contract payment owing is denied.
8. The claimed exemption of Norby Farm checking account, First State Bank, is denied.
9. The claimed exemption of payment for machine hire from Gary Norby is denied.

10. The claimed exemption of Flexible Premium Adjustable Life Insurance Policy #011859651, Life Investors Insurance Company of America, is denied.
11. The claimed exemption of Flexible Premium Variable Life Insurance Policy #17B0473527, Western Reserve Life Assurance Company of Ohio, is denied.
12. The claimed exemption of Whole Life Insurance Policy #2730824, Thrivent Financial for Lutherans, is denied.
13. The claimed exemption of Whole Life Insurance Policy of Daughter, Ashley Norby, Life Investors Insurance Company of America, is denied.
14. The claimed exemption of Whole Life Insurance Policy of Son, Nick Norby, Northwestern Mutual, is denied.

BY THE COURT

Honorable Gregory F. Kishel
United States Bankruptcy Judge

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)

)ss.

COUNTY OF MOWER)

Linda Enstad, of the City of Austin, County of Mower, State of Minnesota, being duly sworn,
states that on the 15th day of October, 2004, she served the annexed:

1. **Notice of Hearing and Motion Objecting to Claimed Exemptions;**
2. **Memorandum of Law;**
3. **Affidavit of Richard L. Noll;**
4. **Proposed Order;**

on:

Charles W. Ries
Bankruptcy Trustee
Maschka, Riedy & Ries, PLLP
P.O. Box 7
Mankato, MN 56002-0007

Kirstin May Norby, and
Kirstin May Norby, d/b/a Elma Lanes, Inc.
RR 1, Box 210
LeRoy, MN 55951

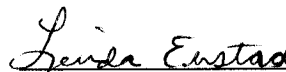
U S Trustee
US Trustee Office
300 S 4th St., Rm 1015
Minneapolis, MN 55415

Paul W. Bucher
Dunlap & Seeger, P.A.
206 S. Broadway, Ste 505
Rochester, MN 55904

Michael Allen Norby and
Michael Allen Norby, d/b/a Elma Lanes, Inc.
RR 1, Box 210
LeRoy, MN 55951

First State Bank of LeRoy
P.O. Box 369
LeRoy, MN 55951

parties in this action, by mailing to them a copy thereof, enclosed in an envelope, postage prepaid,
and by depositing same in the post office at Austin, Minnesota, directed to said persons at the
aforementioned last known addresses.


Linda Enstad

Subscribed and sworn to before me
this 15th day of October, 2004.


Notary Public

